

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)

Implementation of Sections 309(j) and 337
of the Communications Act of 1934 as Amended)

WT Docket No. 99-87

Promotion of Spectrum Efficient
Technologies on Certain Part 90
Frequencies)

RM-9332

ORDER

Adopted: December 1, 2003

Released: December 3, 2003

By the Commission:

I. INTRODUCTION

1. Before us are four requests to stay the effectiveness of a rule adopted in the *Second Report and Order and Second Further Notice of Proposed Rule Making (Second Report and Order)* in this proceeding.¹ The *Second Report and Order* adopted certain measures intended to facilitate the migration to narrowband technology in the private land mobile radio (PLMR) service, including a prohibition on the filing of applications for new wideband operations or expansions of existing wideband operations, beginning six months after publication of the *Second Report and Order* in the Federal Register. For the reasons set forth herein, we find that good cause has been shown to stay this date pending Commission consideration of the petitions for reconsideration filed in this proceeding.

II. BACKGROUND

2. In 1995, in the *Refarming* proceeding, the Commission adopted measures to promote highly effective and efficient use of the PLMR spectrum and facilitate the introduction of advanced technologies into the PLMR services.² The rules provided that, in order to effect a transition from a wideband (25 kHz) channel plan to a narrowband (12.5 kHz and less) channel plan, the Commission

¹ Implementation of Sections 309(j) and 337 of the Communications Act of 1934 as Amended, *Second Report and Order and Second Further Notice of Proposed Rule Making*, WT Docket No. 99-87, 18 FCC Rcd 3034 (2003) (*Second R&O*). The entities requesting a stay are: IPMobileNet, Inc. (IPMobileNet) on August 11, 2003; the American Association of Railroads (AAR) on August 18, 2003; the American Petroleum Institute and the United Telecom Council (API/UTC) on August 18, 2003; and the Association of Public-Safety Communications Officials-International, Inc., the International Association of Fire Chiefs, Inc., the International Municipal Signal Association, the International Association of Chiefs of Police, the Major Cities Chiefs Association, the National Sheriffs' Association, the Major County Sheriffs' Association, and the National Public Safety Telecommunications Council (collectively, Public Safety Petitioners) on August 29, 2003. On November 20, 2004, the Private Wireless Mining Coalition (PWMC) requested that the Commission take immediate action on the AAR and Public Safety Petitioners petitions.

² See Replacement of Part 90 by Part 88 to Revise the Private Land Mobile Radio Services and Modify the Policies Governing Them, *Report and Order and Further Notice of Proposed Rule Making*, PR Docket No. 92-235, 10 FCC Rcd 10076, 10077 ¶ 2 (1995) (*Refarming R&O*).

would approve only increasingly spectrally efficient equipment.³ Specifically, after February 14, 1997, the Commission would approve equipment for wideband operations only if it was capable of operating on 12.5 kHz or narrower channels. Further, after January 1, 2005, the Commission would approve equipment for 25 kHz and/or 12.5 kHz channels only if it was capable of operating on 6.25 kHz or narrower channels.⁴ At that time, the Commission specifically declined to implement a comprehensive set of dates mandating strict manufacturing and licensing requirements,⁵ or to require users to replace existing wideband systems.⁶

3. In 2000, in the *Report and Order and Further Notice of Proposed Rule Making (FNPRM)* in this proceeding,⁷ the Commission, *inter alia*, sought comment on certain proposals to promote new spectrally efficient technologies. Specifically, the Commission sought comment on a petition for rulemaking proposing that non-public safety licensees in the bands between 222 MHz and 896 MHz be required to deploy technologies that achieve the equivalent of one voice path per 12.5 kilohertz of spectrum.⁸ In addition, in the *FNPRM*, the Commission sought comment on the effectiveness of the rules adopted in the *Refarming* proceeding.⁹ The Commission tentatively concluded that the current pace of migration to more spectrally efficient technologies had not been sufficiently rapid, and that it should encourage the migration to narrowband technologies by prohibiting the manufacture or importation of equipment that does not meet certain efficiency standards by certain dates.¹⁰ It also tentatively concluded that requiring the employment of new spectrally efficient technologies by certain dates, as proposed in the rulemaking petition, would impose unreasonable burdens on licensees, and that it would be unfair to require users to replace systems in which they had invested substantial amounts.¹¹

4. In 2003, in the *Second Report and Order* in this proceeding, the Commission concluded that the *Refarming* rules had not resulted in the desired efficiency of use of spectrum in the 150-174 MHz and 421-512 MHz bands, and that further action was required.¹² Consequently, the Commission amended its rules to provide a schedule for the migration of PLMR systems to implementation of narrowband technologies. At issue in the subject stay requests is the Commission's decision, beginning six months after publication of the *Second Report and Order* in the Federal Register, to prohibit any applications for new operations using wideband channels operating in the 150-174 MHz or 421-512 MHz bands, and to allow incumbent wideband Part 90 licensees in these bands to make modifications to their systems only to the extent that their respective authorized interference contours are not expanded as a result thereof.¹³

³ *Id.* at 10081 ¶ 7.

⁴ *Id.*; see 47 C.F.R. § 90.203(j)(2) (1996).

⁵ *Refarming R&O*, 10 FCC Rcd at 10099 ¶ 37.

⁶ *Id.* at 10081 ¶ 7.

⁷ Implementation of Sections 309(j) and 337 of the Communications Act of 1934 as Amended, *Report and Order and Further Notice of Proposed Rule Making*, WT Docket No. 99-87, RM-9332, RM-9405, RM-9705, 15 FCC Rcd 22709 (1999) (*FNPRM*).

⁸ *Id.* at 22772-73 ¶¶ 141-42. See generally AMTA Petition for Rulemaking (RM-9332) at 3 (filed June 19, 1998).

⁹ *FNPRM*, 15 FCC Rcd at 22772-73 ¶ 141.

¹⁰ *Id.* at 22772-73 ¶¶ 141-42.

¹¹ *Id.* at 22773 ¶ 142.

¹² *Second R&O*, 18 FCC Rcd at 3038 ¶¶ 11-12.

¹³ *Id.* at 3038 ¶ 12. The Commission also took other actions, which are not at issue in the subject stay requests. Specifically, no new equipment capable of operating at one voice path per 25 kHz of spectrum (including multi-mode equipment that can operate on a 25 kHz bandwidth) will be approved beginning January 1, 2005, and no such equipment may be manufactured or imported beginning January 1, 2008. *Id.* In addition, non-public safety
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5. The *Second Report and Order* was published in the Federal Register on July 17, 2003.¹⁴ Thus, under the amended rules, no applications for new wideband systems or expansions of existing wideband operations may be filed after January 13, 2004.¹⁵ The Commission received eighteen petitions for reconsideration of the *Second Report and Order*.¹⁶ In addition, four requests for stay of the January 13, 2004 deadline were filed. This *Order* addresses only the stay requests.

III. DISCUSSION

6. In considering requests for stay, the Commission generally considers the four criteria set forth in *Virginia Petroleum Jobbers Association*.¹⁷ These criteria are (1) a likelihood of success on the merits; (2) the threat of irreparable harm absent the grant of preliminary relief; (3) the degree of injury to other parties if relief is granted; and (4) the issuance of the order will further the public interest.¹⁸ The Commission then balances these interests in order to determine an administrative response on a case-by-case basis.¹⁹ There is no requirement that there be a showing as to each criterion.²⁰ The relative importance of the four criteria will vary depending upon the circumstances of the case.²¹ If there is a particularly overwhelming showing in at least one of the factors, we may find that a stay is warranted notwithstanding the absence of another one of the factors.²² For the reasons set forth below, we agree with the parties that a stay of the January 13, 2004 date is appropriate under the circumstances presented. Specifically, we conclude that the extent to which a stay will further the public interest, and the fact that no parties will be injured if relief is granted, merit granting the requested stay.

7. With regard to modifying existing wideband systems, the Public Safety Petitioners argue that prohibiting expansions after January 13, 2004 will impose substantial costs on state and local governments by requiring the premature replacement of entire wideband systems if a system needs to be expanded to accommodate changes in jurisdictional boundaries or population shifts, or to fill in gaps in signal coverage.²³ Similarly, AAR argues that prohibiting expansion of wideband systems after January 13, 2004 will force the railroad industry into "mixed mode" communications (*i.e.*, use of both 12.5 kHz and 25 kHz equipment), which the Federal Railroad Administration recently concluded has the potential for degrading the quality and intelligibility of voice communications.²⁴ With regard to new systems, the

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licensees using channels in these bands must deploy technology that achieves the equivalent of one voice path per 12.5 kHz of spectrum beginning January 1, 2013, and public safety licensees, *see* 47 C.F.R. § 90.20, using channels in these bands must deploy such technology beginning January 1, 2018. *Second R&O*, 18 FCC Rcd at 3038-39 ¶ 12.

¹⁴ 68 Fed. Reg. 42296 (2003).

¹⁵ 47 C.F.R. § 90.209(b)(6).

¹⁶ *See Public Notice*, Rep. No. 2626 (rel. Sept. 3, 2003).

¹⁷ *Virginia Petroleum Jobbers Ass'n. v. Federal Power Commission*, 259 F.2d 921, 925 (D.C. Cir. 1958); *see also*, *e.g.*, Biennial Regulatory Review – Amendment of Parts 0, 1, 22, 24, 26, 27, 80, 87, 90, 95, 97, and 101 of the Commission's Rules to Facilitate the Development and Use of the Universal Licensing System in the Wireless Telecommunications Services, *Memorandum Opinion and Order*, WT Docket No. 98-20, 14 FCC Rcd 9305, 9307 ¶ 4 (1999) (*ULS Stay*).

¹⁸ *Virginia Petroleum Jobbers Ass'n.*, 259 F.2d at 925.

¹⁹ *ULS Stay*, 14 FCC Rcd at 9307 ¶ 4.

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ Public Safety Petitioners Petition for Stay at 2-3.

²⁴ AAR Petition for Stay at 2-3; *see also* API/UTC Motion for Partial Stay at 5-6.

Public Safety Petitioners argue that prohibiting new wideband systems after January 14, 2004 will harm efforts to maintain interoperability²⁵ among public safety entities, because users of new narrowband systems would not be able to communicate with users of existing wideband systems.²⁶ API/UTC note that many licensees in the utility and petroleum and natural gas industries operate extensive, complex systems; and, they argue that six months is not sufficient time to plan and budget for all needed modifications.²⁷ IPMobileNet similarly contends that planning complex new systems takes more than six months.²⁸ We concur that a stay of the January 13, 2004 deadline pending further proceedings would further the public interest.

8. In addition, nothing in the record before us suggests that there will be any injury to any other party if the requested relief is granted. Over the long term, implementation of the rules adopted in the *Second Report and Order* is intended to relieve congestion and clear space for additional licensees in the PLMR bands below 512 MHz. A temporary stay of the January 13, 2004 date pending the resolution of the petitions for reconsideration of the *Second Report and Order* will not exacerbate the problems that the new rules are intended to address. A stay would not result in additional congestion among existing licensees, or preclude the licensing of any new stations that could not be licensed if the prohibition on new and expanded wideband operations were to take effect. Therefore, we agree with API/UTC and IPMobileNet that maintaining the status quo with respect to licensing wideband systems will not injure any party.²⁹

9. In conclusion, we recognize that many PLMR systems are used for extremely important public safety or critical infrastructure purposes. We also are persuaded that six months may not be sufficient time for all licensees to plan all the necessary modifications to their existing wideband systems, or to plan new wideband systems that must be compatible with existing wideband systems, in compliance with the January 13, 2004 deadline. As a result, based on the record before us, we are concerned that retaining such deadline would not further the public interest, because it would adversely affect public safety communications and critical infrastructure operations. We also believe that a temporary stay of the deadline would not injure any party. We therefore conclude that a stay of the January 13, 2004 date is appropriate. For the foregoing reasons, therefore, we will stay the January 13, 2004 deadline for filing applications for new wideband systems or expansions of existing wideband systems in Section 90.209(b)(6) of the Commission's Rules. We grant this stay pending resolution of the petitions for reconsideration of the *Second Report and Order*.

²⁵ The Commission has defined "interoperability" as "an essential communications link within public safety and public service wireless communications systems which permits units from two or more different entities to interact with one another and to exchange information according to a prescribed method in order to achieve predictable results." Development of Operational, Technical and Spectrum Requirements for Meeting Federal, State and Local Public Safety Agency Communications Requirements Through the Year 2010, WT Docket No. 96-86, *First Report and Order and Third Notice of Proposed Rulemaking*, WT Docket No. 96-86, 14 FCC Rcd 152, 189-90 ¶ 76 (1998). The Commission has stated that promoting interoperability among public safety entities is one of its primary goals. See, e.g., *id.* at 183 ¶ 61.

²⁶ Public Safety Petitioners Petition for Stay at 2; see also PPMC Request for Immediate Commission Action at 3.

²⁷ API/UTC Motion for Partial Stay at 6-7; cf. IPMobileNet Motion for Stay at 3, 8; PPMC Request for Immediate Commission Action at 3-4. API/UTC also warns that attempting to avoid the problems described above by beginning the implementation process for new systems within the January 13, 2004 deadline could result in irreparable harm, because attempting to meet the deadline will result in engineering/implementation errors that could have serious consequences. API/UTC Motion for Partial Stay at 7-9; cf. IPMobileNet Motion for Stay at 8-9; PPMC Request for Immediate Commission Action at 3.

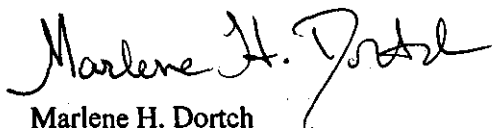
²⁸ IPMobileNet Motion for Stay at 8.

²⁹ See API/UTC Motion for Partial Stay at 7-8; IPMobileNet Motion for Stay at 8-9.

IV. ORDERING CLAUSE

10. For the aforementioned reasons, IT IS ORDERED pursuant to Sections 4(i), 11, 303(g), and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 161, 303(g), and 303(r), that the Requests for Stay filed by IPMobileNet, Inc. on August 11, 2003; the American Association of Railroads on August 18, 2003; the American Petroleum Institute and the United Telecom Council on August 18, 2003; and the Association of Public-Safety Communications Officials-International, Inc., the International Association of Fire Chiefs, Inc., the International Municipal Signal Association, the International Association of Chiefs of Police, the Major Cities Chiefs Association, the National Sheriffs' Association, the Major County Sheriffs' Association, and the National Public Safety Telecommunications Council on August 29, 2003, ARE GRANTED and will remain in effect until resolution of the petitions for reconsideration filed in this proceeding.

FEDERAL COMMUNICATIONS COMMISSION



Marlene H. Dortch
Secretary